No. 3857

United States
Circuit Court of Appeals
For the Ninth Circuit

THE CONTINENTAL OIL COMPANY,
a Corporation,
Plaintiff in Error,

J. W. WALKER, as State Treasurer of the State of Montana, *Defendant in Error.*

Brief for Plaintiff in Error

GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

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STATEMENT OF CASE.

This is an action to recover the sum of $13,058.74 license tax paid the defendant in error, under protest. A demurrer was interposed to the amended complaint and sustained, and thereupon a judgment was rendered dismissing the action.

In the amended complaint it is alleged:

> "That the plaintiff is now and has been since prior to January 1, 1921, engaged in carrying on the business of selling gasoline and distillate in the State of Montana, and during the period from and including January 1, 1921, to and including March 4, 1921, actually sold and delivered in said state, gasoline and distillate to the amount of 1,305,874 gallons.

"That the defendant, as such state treasurer, demanded of this plaintiff the payment of a license tax of one cent per gallon for each gallon of gasoline and distillate so sold during the period aforesaid, and in making said demand assumed that Chapter 156 of the Session Laws of Montana 1921, required the payment of such tax, and that he was authorized thereby to demand and collect the same.

"That if said statute is construed and held to require this plaintiff to pay a license of one cent per gallon for each gallon of gasoline and distillate sold during said period for conducting, engaging in and carrying on such business after March 4, 1921, it is in conflict with the fourteenth amendment to the Constitution of the United States, in that it denies to plaintiff the equal protection of the laws by requiring plaintiff and others engaged in and carrying on such business prior to March 5, 1921, to pay a higher license tax for engaging in and carrying on such business after March 5, 1921, the date when said statute went into effect, than those who commenced and carried on such business on or after said date; and if said statute is construed and held to be retroactive, and to require the payment of such license tax for having engaged in and carried on such business from and including January 1, 1921, to and including March 4, 1921, it is in conflict with the said fourteenth amendment in that it deprives plaintiff of its property without due process of law.

"That on August 3rd, 1921, this plaintiff complied with the demand so made, and paid the said defendant, as state treasurer, the sum of $13,058.74, which was at the rate of one cent per gallon for the gasoline and distillate so sold by plaintiff in the State of Montana during the period aforesaid.

"That plaintiff, deeming the said license fee or tax demanded and paid as aforesaid, unlawful, paid the same and the whole thereof under protest to the said defendant, as state treasurer, and the amount so paid has been deposited by said defendant, as state treasurer, in a special fund, designated 'Protest License Fund,' and is now held by him in said fund."

The Act of the Legislative Assembly constituting Chapter 156 of the Laws of Montana of 1921, was approved and became effective March 5, 1921. Section 3 of the Act provides:

"Every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this state, pay to the State Treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in such business in this state, equal to one cent for each gallon of gasoline and one cent for each gallon of distillate sold or distributed by such dealer in this state during such year."

Section 6 provides:

"Each and every dealer, must within thirty (30) days after the quarter ending March 31st, 1921, and within thirty (30) days after the ending of each following quarter, make out in duplicate, on forms prescribed by the State Board of Equalization, and deliver to the State Treasurer, a statement showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter, which was purchased by him in the original packages in which the same was shipped, transported or imported into this State; and the total amount due to the State of Montana as license taxes for such quarter."

Section 7 provides:

> "Each distributor and each dealer must, within thirty (30) days after the end of each such quarter, and at the same time the statement required by Section 6 of this Act is delivered to the State Treasurer, pay to the State Treasurer, the amount of the license tax shown by such statement to be due for the quarter for which the statement is made and filed."

The question for determination is whether the tax for the quarter ending March 31st, 1921, should be measured by the number of gallons sold during that quarter, both prior and subsequent to the date the act was approved and became a law, or by the number of gallons sold between March 5th, 1921, the date of the approval of the Act, and March 31st, 1921.

ASSIGNMENT OF ERROR.

The court erred in sustaining the demurrer to the amended complaint.

BRIEF AND ARGUMENT.

Section 1 of Article XII of the Constitution of Montana, after providing that—

> "The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly,"

by the taxation of all property, with certain exceptions, provides,

> "The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the State."

It was by virtue of this constitutional provision that the statute under consideration was enacted.

The privilege of doing business, for which the license tax is required, is the privilege exercised after March 5, 1921, the date of the approval of the act. If the plaintiff in error had ceased business on the day the act was approved, there could be no liability for the payment of any license tax. It follows that, while the statute provides for the payment of a license tax "for the year 1921," by those engaged in such business during the year, as a matter of fact the tax is required for only that part of the year during which business was carried on after March fifth.

When we consider that the statute imposes the license tax for engaging in business after the law went into effect, and not for having engaged in business prior to that date, the statute, so far as it relates to the year 1921, must be construed as though it had read,

> Every dealer shall, for that part of the year 1921 after March 5, that he shall engage in such business, pay a license tax equal to one cent for each gallon of gasoline and distillate sold or distributed by him during such part of said year.

If the construction of Section 3 thus contended for is correct, Section 6 can have reference only to the number of gallons of gasoline and distillate sold

during the quarter ending March 31, 1921, after March 5th, the date of the approval of the Act.

The construction thus contended for is strongly supported by the provisions of Section 5 of the Act, which requires each dealer to keep a record "in such form as the State Board of Equalization shall require," showing the total number of gallons of gasoline and distillate sold by him, etc., and providing that "all such records shall at all times during the business hours of the day be subject to inspection by the State Board of Equalization, its memebers, agents or employes." Section 6 of the Act clearly contemplates that the record thus required to be kept shall be used as a basis for making the statement from which the amount of the tax is calculated. These provisions evidence a clear intent that the statute should have a prospective operation only.

It is, however, a general and well established rule of statutory construction that a statute should not be construed so as to have a retroactive operation, unless the language thereof imperatively calls for such a construction.

Dodge v. Nevada State Nat. Bank, 109 Fed. 726.

(Decided by this Court)

Schwab v. Doyle, decided by the Supreme Court of the United States, May 1, 1922, Adv. Opinions, published by the Lawyers Co-operative Publishing Company, No. 14, page 461.

This rule of statutory construction has been embodied in Section 3 of the Revised Codes of Montana of 1921, which provides:

> "No law contained in any of the Codes or other statutes of Montana is retroactive, unless expressly so declared."

To construe the statute as requiring the payment of a license tax, measured by the quantity of gasoline sold between January 1st and March 5th, 1921, would be giving it a retroactive effect.

Schwab v. Doyle, cited above.

The case of Schwab v. Doyle involved the construction of an Act of Congress, entitled: "Estate Tax Act" approved September 8, 1916, 39 Stat. at L., 777 to 780. The act provided for the imposition of a tax upon the transfer of the net estate of every person dying after the passage of the act,

> "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

It appeared that one Augusta Dickel, in the month of April, 1915, had assigned and delivered

to a trust company stocks, bonds and securities of the declared value of one million dollars, and Dickel had died on September 16, 1916, or seven days before the approval of the said Act of Congress. Upon the assumption that the act was applicable to the assignment to the trust company, made by Augusta Dickel, a tax was imposed accordingly, and paid under protest. The action was to recover the tax. The Court, in the opinion, said:

> "The initial admonition is that laws are not be to considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. Com. 455; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; Story, Const. Sec. 1398. The comment of Story is: 'Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'
>
> "There is absolute prohibition against them when their purpose is punitive; they then being denominated expost facto laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.
>
> "The Act of September 8, 1916, is within the condemnation.
>
> "There is certainly in it no declaration of retroactivity, 'clear, strong, and imperative,' which is the condition expressed in United

States v. Heth, 3 Cranch, 398, 413, 2 L. ed. 479, 483, also United States v. Burr, 159 U. S. 78, 82, 83, 40 L. ed. 82-84, 15 Sup. Ct. Rep. 1002.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

We respectfully submit that, for the same reason that it was held in Schwab v. Doyle, that the Act of Congress did not apply to prior transfers, the statute under consideration does not apply to sales made prior to its enactment.

* * * * * *

No one, we take it, would contend that the Legislative Assembly could require the payment of a larger sum as a license tax for the business of selling gasoline and distillate from one individual or corporation than from another. This, however, would be the effect of the statute, if it is construed to apply to prior sales. The plaintiff sold, during the year 1921 prior to the 5th day of March, 1,305,874 gallons of gasoline and distillate. If it had commenced business on the 5th day of March, it could have conducted the business of selling gasoline and distillate for the balance of the year by the payment of a license tax, based on the number of gallons sold subsequent to March 5th. All others commencing business on March 5th had the same right. It follows, then, that to construe the statute as applying to prior sales operates to impose a higher tax upon those engaged in such business

prior to March 5th than is imposed upon those commencing such business on or subsequent to such date.

While the Legislative Assembly may classify for the purpose of taxation, a classification for the purpose of a license tax which would distinguish between those engaged in business at the time of the imposition of the tax and those who should commence business thereafter is, we submit, an unreasonable classification.

> Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150;
> Barbier v. Connolly, 113 U. S. 27,
> Connolly v. Union Sewer Pipe Co. 184 U. S. 540.

The lower court, in answer to the contention that the statute is violative of the equal protection clause of the Federal Constitution, said that:

> "Dealers engaged in business before March 5, 1921, had an advantage in known location, good will and established trade which rendered the privilege for the balance of the year or quarter more valuable to them than was the like privilege to new-comers in the business."

and for this reason it was permissible to require the payment of a higher license tax by those engaged in business at the time the law went into effect than is required of those who commenced business thereafter.

If the lower court's construction of the statute is correct, then if plaintiff in error had ceased business on March 5th, and had commenced business

again on the last day of the year 1921, it would have been required to pay a license tax based on the sales made during the year prior to March 5th, as well as on the sales made the last day of the year, notwithstanding under such circumstances it would have had no advantage over those who commenced business after March 5th—"in know location, good will and established trade."

* * * * * *

The authority for this action is found in Section 2409 of the Revised Codes of Montana of 1921, which provides as follows:

> "Whenever any license fee is demanded of any person for the use and benefit of the state of Montana, and the same is deemed unlawful by the person from whom the same is demanded, such person may pay the same, or so much thereof as may be deemed unlawful, under protest to the state treasurer, who shall deposit the same in a special fund to be designated 'Protest License Fund'; and thereupon the person paying, or his legal representatives, may bring an action in a court of competent jurisdiction against the state treasurer to recover the same, without interest; provided, that any action instituted to recover any license paid under protest shall be commenced within sixty days after the date of payment thereof to the state treasurer."

Respectfully submitted,

GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error.